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No. 88-1154

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

RONALD S. MONROE,

Petitioner,

v.

HILTON BUTLER,
WARDEN, LOUISIANA STATE PENITENTIARY,
ANGOLA, LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS, LOUISIANA

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Preliminary Statement

In conformance with this Court's Rule 22.5, petitioner confines this Reply Brief "to arguments first raised in the brief in opposition . . . ."[1]/ The only new argument raised in the State's brief is that

1/ We do feel compelled to note that the State's accusation that Monroe made his application for post-conviction relief "[i]n concert with [his] strategy of delay, exaggeration, and obfuscation" (State opposition brief at 2) is outrageous and untrue. The Louisiana Supreme Court thought enough of the merits of Monroe's application that it stayed an execution date in late August 1988, two months later denied his application by the narrowest of margins in a four to three vote, and one month later stayed another execution date pending review by this Court. The State's further accusation that "[i]n stating grounds for a stay, petitioner misled the state court" (State opposition brief at 2-3) is equally outrageous and untrue. After the State made this very accusation in a motion to reconsider the stay order, the Louisiana Supreme Court denied the motion. Finally, the State's accusation that Monroe has engaged in a "strategy of delay" is ironic not only (continued)

this Court must deny a writ of certiorari because review of Monroe's claims is now precluded by *Teague* v. *Lane*, 109 S. Ct. 1060 (1989).2/

The State's argument is misplaced. As shown below, *Teague* should not prevent the granting of a writ of certiorari since the claims here fall within *Teague*'s innocence exception and since *Teague* itself should not apply retroactively.3/

Perhaps more importantly, the State ignores the fact that *Teague* leaves open the issue of whether it applies in a death penalty context at

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(continued)
because Monroe has always scrupulously adhered to all procedural requirements but also because the State is the party which submitted its most recent brief in opposition three months late. Furthermore, the State never informed Monroe's counsel of its discussions with this Court's Chief Deputy Clerk in response to his letter of February 23, 1989, promising an opposition brief by April 1, 1989.

2/ In the "Argument" section of its brief in opposition, the State argues that *Teague* precludes review of Monroe's *Booth*, *Caldwell* and *Mills* claims, while in its "Reasons for Denying Certiorari" section, the State asserts that *Teague* also prohibits Monroe from raising his *Penry* claim. The State does not contend that *Teague* precludes or prohibits Monroe's first claim (that the Eighth Amendment bars the execution of a person when there is substantial newly discovered evidence which creates a reasonable doubt as to his guilt). For the convenience of the Court, the present Reply Brief discusses *Teague* in relation to all five of Monroe's claims.

3/ *Teague* also should not prevent the granting of a writ of certiorari for two other reasons.

First, the State did not raise nonretroactivity as a defense to Monroe's claims below and has therefore waived that defense. *See Federal Trade Comm'n* v. *Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983); *Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980). *See also Zant* v. *Moore*, 109 S. Ct. 1518, 1519 (1989) (Blackmun, J., dissenting).

Second, the *Teague* rule seems to represent an interpretation of the federal habeas corpus statute rather than the Constitution. *See Teague* v. *Lane*, 109 S. Ct. 1060, 1079 (1989) (White, J., concurring); *id.* at 1084–94 (Brennan, J., and Marshall, J., dissenting). *See also id.* at 1075 n.2 (plurality opinion). If so, *Teague* has nothing to do with this case since Monroe's present claims do not arise out of a *federal* habeas corpus proceeding but rather out of his application for *state* post-conviction relief. If there is any doubt as to whether *Teague* is limited to federal habeas corpus proceedings or should be extended to state post-conviction relief proceedings, then that issue is worthy of review by this Court. *See* note 4 *infra*.

all: "Because petitioner is not under sentence of death, we need not, and do not, express any views as to how the retroactivity approach we adopt today is to be applied in the capital sentencing context." *Id.* at 1077 n.3. By relying on *Teague*, the State has in fact presented another question worthy of review by this Court: Does the *Teague* rule apply to collateral challenges to a death sentence? If this Court addresses that question,[4]/ its answer should be in the negative.

I. If *Teague* Applies to Capital Cases, Monroe's Claims Fall Within an Exception to the Rule

Even if applicable to capital cases, the *Teague* rule does not prevent this Court from granting a writ of certiorari and considering Monroe's claims on their merits. Monroe's claims fall within *Teague*'s second exception, which permits the retroactive application to a case on collateral review of new rules requiring "the observance of those procedures that . . . are implicit in the concept of ordered liberty," *Teague* v. *Lane*, 109 S. Ct. 1060, 1075 (1989), and "without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 1077.

Monroe's first claim — that the Eighth Amendment cannot countenance the execution of a person where, as here, there is substantial, newly discovered evidence which creates a reasonable doubt as to guilt — is a paradigm of the *Teague* exception for new rules designed to assure "the likelihood of an accurate conviction . . . ." It is hard to

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4/ While this question was not raised in Monroe's Petition for a Writ of Certiorari, this Court might nonetheless order the parties to address this additional question because of its importance, *see generally Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *Fry* v. *United States*, 421 U.S. 542, 545 n.5 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 319-21 & n.6 (1971), or because the question is "fairly comprised" within the other questions since it is a "predicate to the intelligent resolution" of those questions. *Vance* v. *Terrazas*, 444 U.S. 252, 258-59 n.5 (1980); *Cuyler* v. *Sullivan*, 446 U.S. 335, 342-43 n.6 (1980). This approach might be especially appropriate here since the question arises out of a decision of this Court which was made after Monroe filed his Petition for a Writ of Certiorari and which represents a change of law. *See Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 896 n.7 (1984); *Standard Industries* v. *Tigrette, Inc.*, 397 U.S. 586, 587-88 (1970) (Black, J., dissenting).

imagine a constitutional claim which more squarely meets the standard of "the relevance of the likely accuracy of convictions," *Teague* v. *Lane*, 109 S. Ct. 1060, 1076 (1989), than one, as here, bottomed on petitioner's innocence of the crime for which he is condemned to die. If the right Monroe asserts does indeed exist, then it can only be vindicated in post-conviction proceedings.

If *Teague* does apply to capital cases, this Court must clarify the meaning of the second *Teague* exception in relation to capital sentencing. *See Dugger* v. *Adams*, 109 S. Ct. 1211, 1218 n.6 (1989) ("We do not undertake here to define what it means to be 'actually innocent' of a death sentence.") It would seem that *Teague*'s concern for "the likely accuracy of convictions" finds its logical capital sentencing parallel in a concern for "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

As so applied to capital sentencing, the second *Teague* exception must include Monroe's claims for violations of *Booth* v. *Maryland*, 482 U.S. 496 (1987), *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985), and *Mills* v. *Maryland*, 108 S. Ct. 1860 (1988). Each of these three decisions was designed to ensure that death sentences are reached on the basis of fair and accurate deliberation rather than prejudice. And the violations of these three decisions here — alone or in combination — caused Monroe actual prejudice. Since the jury, as the Louisiana Supreme Court has noted, came close to a deadlock on the penalty, *State* v. *Monroe*, 397 So. 2d 1258, 1271 (La. 1981), these violations might well have tipped the balance between life and death.

In short, both constitutional protection against the execution of an innocent man and the guarantee that a death sentence has not been caused by constitutional violations are exceptions to the general rule of nonretroactivity; both are "implicit in the concept of ordered liberty" and necessary to ensure accurate convictions and sentences.

II. If *Teague* Applies to Capital Cases, It Should Apply Prospectively, Not Retroactively

The *Teague* rule should also not prevent this Court from granting a writ of certiorari since, even if it applies to capital cases *prospectively*, it surely should not apply to them *retroactively*.

A central tenet of Eighth Amendment jurisprudence is the prohibition against "the arbitrary and capricious infliction of the death penalty." *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion); *Furman* v. *Georgia*, 408 U.S. 238 (1972). A central tenet of *Teague* is the importance of the even-handed treatment of those similarly situated. *Teague* v. *Lane*, 109 S. Ct. 1060, 1077–78 (1989). Both of these tenets, however, would be undermined by changing the rules governing relief for all capital inmates on collateral review as of the date of the *Teague* decision. Doing so would create two arbitrary classes of similarly situated but dissimilarly treated collateral capital inmates. Members of the first class would benefit from new constitutional rules simply because their courts acted more expeditiously and reached their cases before the *Teague* decision while members of the second class would not benefit simply because their courts were busier and reached their cases after the *Teague* decision. Members of the first class would be spared, through no special virtue of their own; members of the second class would be executed, through no special fault of their own.

To avoid arbitrary death sentences and to ensure even-handed treatment, this Court should decline to give Teague retroactive effect so as to bar relief for capitally-sentenced inmates during collateral review.

III. The *Teague* Rule Should Not Apply to Collateral Challenges to a Death Sentence

This Court should hold — if it reaches the issue — that the *Teague* rule does not govern collateral challenges to a death sentence.

A. The Eighth Amendment's Prohibition Against Arbitrary Punishment

Extending the *Teague* rule to capital cases would lead to just the sort of "arbitrary and capricious infliction of the death penalty" which the Eighth Amendment should prevent.

In the capital context, the *Teague* rule would hasten or stop executions on nothing more than the timing of appeals and collateral review. Inmates still on direct appeal would benefit from new constitutional pronouncements while inmates in collateral review proceedings would not. They would be put to death — even if they suffered the *same* constitutional injury, raised the *same* objection and took the *same* steps to preserve the issue. They would be put to death — regardless of the fortuity of the factors leading to the announcement of the new constitutional principle during their collateral review proceedings instead of their direct appeal.

In short, the *Teague* rule, if applied to capital cases, would create a situation in which inmates would be granted relief for constitutional violations or be sent to their deaths based on nothing more than the vagaries of appellate review — a wanton and freakish imposition of the death penalty which the Eighth Amendment forbids.

B. The Eighth Amendment's "Evolving Standards of Decency"

Extending the *Teague* rule to capital cases would also thwart this Court's role both in developing rules for capital sentencing hearings and in reflecting "evolving standards of decency" under the Eighth Amendment.

In applying the *Teague* rule to noncapital cases, this Court reasoned that it is "unlikely that many . . . components of basic due process [namely, 'accuracy-enhancing procedural rules' needed to facilitate 'the likelihood of an accurate conviction'] have yet to emerge." *Teague* v. *Lane*, 109 S. Ct. 1060, 1076, 1077 (1989). This reasoning, however, does not apply to capital cases.

For one thing, the "components of basic due process" are still emerging with regard to capital sentencing hearings. In their present form, such hearings are of recent vintage. Only since the decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), has this Court begun to define the contours of such hearings and to clarify what fundamental principles of due process are constitutionally required with regard to them. *See, e.g., Mills* v. *Maryland*, 108 S. Ct. 1860 (1988); *Booth* v. *Maryland*, 482 U.S. 496 (1987); *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985); *Bullington* v. *Missouri*, 451 U.S. 430 (1981); *Lockett* v. *Ohio*, 438 U.S. 586 (1978). Thus, "components of basic due process" with regard to capital sentencing hearings must be allowed to emerge in collateral review proceedings as well as on direct appeal.

For another thing, a capital case, such as this one, implicates not only due process but also the Eighth Amendment. While the "components of basic due process" in a noncapital context might now be well-established, Eighth Amendment jurisprudence must be guided by the "evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion, per Warren, C.J.). To ensure that Eighth Amendment standards of decency have the chance to evolve, they too must be allowed to do so in collateral review proceedings as well as on direct appeal.

C. The Balancing of Interests in the Capital Context

In *Teague*, this Court found that society's interests in "the principle of finality which is essential to the operation of our criminal justice system" were weighty enough to tip the balance against the retroactive application of new law on collateral review for ordinary criminal cases. *Teague* v. *Lane*, 109 S. Ct. 1060, 1074 (1989). In capital cases, however, the balance tips in favor of such retroactive application because of the compelling interests of both the capital inmate and society in the constitutional integrity of the judgment.

Society, as well as the capital inmate, has a unique and continuing interest in the ultimate reliability of a capital sentence. As this Court has stated: "[T]he qualitative difference of death from all other

punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California* v. *Ramos*, 463 U.S. 992, 998–99 (1983). As this Court has also stated: "It is of vital importance *to the defendant and to the community* that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) (emphasis added). The retroactive application of new law on collateral review furthers the interest in capital sentencing reliability, promoting for death sentences the "greater degree of scrutiny" and "decision[s] . . . based on reason" which do the inmate justice and society credit.

Thus, this Court has recently required a state to vacate a death sentence where later proceedings showed that one of the predicates for that sentence was unconstitutionally unreliable. *Johnson* v. *Mississippi*, 108 S. Ct. 1981 (1988). That is precisely what happened here. In later proceedings, the federal courts found a reasonable doubt that did not otherwise exist (App. D at 4).

Moreover, society's interests in finality are less in a capital than in a noncapital case. In noncapital cases, finality spares the State the risks of a retrial, prevents the inmate from escaping punishment and promotes rehabilitation. *See Kuhlmann* v. *Wilson*, 477 U.S. 436, 452–53 (1986) (plurality opinion); *Mackey* v. *United States*, 401 U.S. 667, 690 (1971) (Harlan, J., concurring in part and dissenting in part). In a capital case like this one, however, the State is subjected to no prejudice by a retrial, since all prosecution evidence from the original trial is still available; the inmate has not, and will not, escape punishment, but only death, which is especially appropriate if he is indeed innocent; and rehabilitation is promoted by avoiding the death sentence, especially with a model prisoner like Monroe, while rehabilitation is rendered meaningless by an actual execution.

Finally, in the present case, pronouncing a new rule of constitutional law or applying a previous new rule, would not undermine the finality of other death sentences. The circumstances of the present case are extraordinary, and there are few, if any, similarly situated capital inmates.

Conclusion

For the foregoing reasons and for all the reasons stated in the Petition for a Writ of Certiorari, the Petition for a Writ of Certiorari should be granted.

Dated: May 16, 1989

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